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James R. Paschall
General Attorney

January 9, 2004



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via Airborne Express
Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 34415, Ohio Department of Transportation -
Petition for Declaratory Order - Status of Track at Findlay, Hancock County,
OH - Norfolk Southern Railway Company's Motion to Reject or to Strike
Reply Filed by the Ohio Department of Transportation to NSR's Response to
Petition for Declaratory Order

Dear Mr. Williams:

This letter is Norfolk Southern Railway Company's (NSR) Reply to the Comments of Michigan Sugar Company filed December 23, 2003 in the subject proceeding.

In a January 5, 2004 letter reply to Michigan Sugar's Comments, the Ohio Department of Transportation urged the Board to reject those Comments as an untimely reply to ODOT's Petition for Declaratory Order. NSR suggests that the Board might consider the Comments to be a petition to intervene and comment by an interested party. Since consideration of Michigan Sugar's brief comments at this time would not appear to result in unduly delay in the disposition of the proceeding, the Board could accept the filing, but subject to the replies of ODOT and NSR.

We view Michigan Sugar's most pertinent comment to be confirmation of the continuation of the (separate) negotiations by both that company and NSR with ODOT to reach a settlement of the underlying dispute. Somewhat incongruously, since NSR's negotiations with ODOT are progressing rather well in our view and we understood Michigan Sugar's were also continuing, ODOT still urges the Board to reach a quick decision in this proceeding. We think some reasonable additional time should be allowed for negotiations. Since this case has some unusual facts and has engendered controversy, a settlement would be preferable to further litigation for all the parties and the Board. We realize that the matter cannot be postponed indefinitely and without progress

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reports, so we will endeavor to determine with ODOT, and with Michigan Sugar if possible, whether an agreed postponement or deadline can be reached, and progress reports made to the Board if the process becomes prolonged, so that settlement might be encouraged. The court might also be advised and requested to grant additional time for consideration of this matter if necessary. NSR does not suggest postponement of a decision beyond the time that the parties are engaged in productive negotiation.¹

We disagree with Michigan Sugar's contention that it has sole discretion in matters pertaining to the duration or abandonment of the rail spur on its property. Perhaps this contention might have had some validity under State law when excepted tracks were not subject to the ICC's jurisdiction.² However, the transfer of jurisdiction over the abandonment of excepted tracks, such as spur tracks, to the Board must bring with it a consistent interpretation of the principles applicable to railroad line abandonments according to federal abandonment law and precedent. To the extent that either ODOT or Michigan Sugar would make state law claims seeking to force NSR to abandon its interest in providing service over the subject track, such claims are preempted by the ICCTA. Thus, such claims are made subject to Board jurisdiction and they should be handled according to the same legal principles and precedent that the Board or a Court would apply to a line of railroad, except for the important limitation that under 49 U.S.C. 10906 the Board and the courts (because of 49 U.S.C. 10502) are without authority or jurisdiction to make decisions that would permit or require involuntary abandonments of excepted tracks by railroads after review of specific cases.

Third parties, whether they are the governmental entities, non-carrier owners of the property, or railroad lessors or licensors, who wish to force a rail carrier which operates a track that it owns, leases or has trackage rights over, to give up its right to operate, and whatever property right it may operate under, first must receive a Board decision in an adverse abandonment case that the public convenience and necessity require the

¹A settlement between ODOT and NSR probably would render this proceeding moot, but this might depend on the terms of the settlement and position of all the parties if NSR reached a settlement with ODOT but Michigan Sugar Company did not. If the proceeding were not rendered moot by such a settlement, we think the issues as well as the facts of the continuing controversy might not be identical to those now presented.

²This would have depended on State regulatory law as well as contract law because as ODOT points out, Michigan Sugar is not a rail carrier and thus would not have been subject to ICC jurisdiction and is now not subject to STB jurisdiction.

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abandonment of the line.³ Only after that decision is made in their favor can they proceed with state law claims in condemnation, ejection or other proceedings. Of course, the Board has no authority and no court has any jurisdiction to make such an adverse abandonment determination with respect to a spur or other track included under 49 U.S.C. 10906. Thus, an adverse claim by Michigan Sugar against NSR with respect to abandonment of the track or right-of-way would face the same gap in regulatory authority that ODOT faces if it were to try to terminate involuntarily NSR's right to serve the site. If NSR determines it should retain its ability to serve the existing or a potential future customer at the industrial site, the law gives NSR the right to keep its easement. The State Court is without jurisdiction to order any remedy that would result in NSR's abandonment of the track as a matter of contract interpretation, if there really even is one here that might determine the outcome of this case, because this would result in adverse abandonment of the railroad easement, which the State Court is pre-empted from requiring under 49 U.S.C. 10502. Regardless of any party's view of the desirability of this situation or the results that are required, it is the state of the law.

Fortunately, it appears that the quandary presented by this situation does not require either an Act of Congress or the arrogation of jurisdiction or authority by a State Court or the Board to resolve in this case. NSR and Michigan Sugar are both negotiating to cede their interests in the subject easement to ODOT.⁴ Moreover, we think NSR and

³These principles were expressed in the U. S. Supreme Court's decision in *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946). See also *City of Des Moines, IA v. Chicago & North Western Ry. Co.*, 264 F.2d 454 (8th Cir. 1959) and the citations to court and agency decisions by both parties in earlier filings in this case. Our earlier explanation of the law and citation of authorities obviates the need for their repetition.

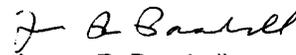
⁴Our view is that NSR and Michigan Sugar Company both have interests in the easement if ODOT takes or diminishes its value or NSR and Michigan Sugars cede it to that governmental entity. NSR's easement right, which Michigan Sugars can no longer unilaterally terminate (if it ever could have) provides the valuable and irreplaceable right and ability to serve an industrial site through a track on the property. Michigan Sugar Company not only has its property interest in the land over which the easement passes but benefits from the rail transportation service to its facility. Both parties effectively use and benefit from the easement property. ODOT's proposed use of the property would end NSR's right to use the property for its business as well as the ability of the current or future owner of the property to receive rail service. Thus, Michigan Sugar's property interest does not, and now can not, exclude NSR's interest. On the other hand, NSR's interest does not diminish Michigan Sugar's interest because it receives its rail transportation over the easement. While this may be an important consideration in settling the dispute, and

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ODOT are nearing agreement on key settlement terms. We are unaware of any claim or demand by Michigan Sugar against NSR that is inconsistent with or would impede a settlement of the case.⁵ Therefore, ODOT may be able to settle the matter with both parties without further dispute and possible continuation of complicated and prolonged litigation and appeals. While we believe the principles and the outcome with respect to the determination of NSR's rights and interests are clear, in this event, the Board will be able to avoid issuing a decision applying these principles in this somewhat unusual situation if a settlement is reached.

The original and eleven copies of this letter are enclosed. Please verify the filing of this pleading by stamping and returning the additional enclosed copy of this letter in the enclosed self-addressed, stamped envelope. Thank you.

Very truly yours,


James R. Paschall

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possibly would be of some importance if a decision on the merits of the condemnation could be made, it appears to have no relevance to the Board's determination with respect to the applicable legal principles, and in particular, its and the Court's authority over spur track abandonment, in this proceeding.

⁵NSR is not preventing ODOT and Michigan Sugar from settling their dispute by an unreasonable insistence on keeping its right to serve the site despite the possibility of a reasonable settlement with ODOT. Michigan Sugar has not claimed that NSR does not have a compensable interest in addition to its own interest or made any other inconsistent claim as far as we are aware.